1986

Docutel-Olivetti Corporation v. Dick Brady Systems, Inc. : Reply Brief

Utah Supreme Court

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1986 20835

IN THE SUPREME COURT OF THE STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION, Plaintiff-Respondent,	:	
vs.	:	Docket No. 20835
DICK BRADY SYSTEMS, INC., RICHARD BRADY and DOES 1 through 10, Defendants-Appellants.	:	

REPLY BRIEF OF DEFENDANTS - APPELLANTS

Appeal from anti-arbitration orders issued in favor of Plaintiff-Respondent in the Third Judicial District Court in and for the County of Salt Lake, State of Utah, the Honorable Homer F. Wilkinson, Judge.

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I. DOCUTEL-OLIVETTI'S BRIEF IS INADEQUATE, PRIMARILY BEING AN ATTEMPT TO PROCEDURALLY DISTRACT THIS COURT FROM THE BONA FIDE ISSUES AND MERITS OF THIS APPEAL.

Ignoring the contract provision it wrote, that "all disputes" be arbitrated, and paying no heed to the Federal and State legislative and judicial policies favoring arbitration and requiring that arbitrable disputes be placed in arbitration as rapidly as possible, Docutel-Olivetti [in response to Systems' and Brady's simple demand for arbitration] has compelled Systems and Brady through a procedural economic death march over the last eleven months, thereby sky rocketing legal fees to a level in excess of $50,000.00 per side in its endless attempt to avoid, if possible, arbitration of its claim, which Docutel-Olivetti values at a mere $49,000.00. One procedural maneuver has been superimposed upon another by Docutel-Olivetti. Often the same procedural tactic has been repeated several times.

Predictably, on this appeal, Docutel-Olivetti continues its effort to avoid the merits of the appeal in lieu of burdensome, endless and non-meritorious procedural arguments. For example, Docutel-Olivetti, devotes the first 33½ pages of its 49 page Brief to jurisdiction and other alleged procedural deficiencies.

The intent of Docutel-Olivetti [which has not cross appealed here] is to fragment and dilute the nature of this appeal in the hope of distracting the Court's attention from the merits of the appeal by addressing non-existing procedural issues, not raised below. For example only,

Docutel-Olivetti did not challenge below the Trial Court's decision to apply the 1985 UAA, but now, for the first time, attempts to do so, rather than to meaningfully respond to the bona fide issues of the appeal.

Also, Docutel-Olivetti, by its "matters of record" assertions, attempts to obscure this Court's understanding of Systems' and Brady's contentions as to what has happened below, before this Court on Motions, before Judge Greene in Federal Court, before the Tenth Circuit and before the American Arbitration Association (AAA).

At the same time, Docutel-Olivetti inconsistently asks this Court to look beyond the so-called "record" so far as Docutel-Olivetti's arguments are concerned. Docutel-Olivetti's reasons for asking this Court to apply a dual standard to the "record on appeal" are two fold.

First, Docutel-Olivetti hopes to prevail by causing ambiguity and uncertainty to replace clarity as to events favorable to Systems and Brady. Second, Docutel-Olivetti wishes to conceal from this Court several major and prejudicial inconsistencies in the positions of Docutel-Olivetti, in the five forums identified above.

Docutel-Olivetti should not be permitted to impose an artificial limitation on this Court's knowledge of all relevant events. Indeed, since all events in the five aforementioned forums relate to a common arbitration matter, where there has been no examined and cross-examined witnesses, and no trial evidence per se, common sense as

well as the Rules of this Court strongly indicate that a meritorious resolution of this appeal necessitates that this Court be accurately informed of the events in this and all other related proceedings. See also Rules 106 and 201, Utah Rules of Evidence and Rule 37(a), U.R.A.P.

II. THE REINSTATEMENT OF THE FEDERAL APPEAL IS RELEVANT TO PROCEEDINGS HEREIN.

The corresponding Tenth Circuit appeal and cross appeal have been reinstated following filing of the Brief of Systems and Brady herein. (A. 107).

The reinstatement represents a material change in circumstances, which was properly brought to the attention of this Court by Systems and Brady. Seemingly, however, Docutel-Olivetti ignores the reinstatement in its Brief.

Instead, Docutel-Olivetti attempts to convince this Court that it cannot review Judge Wilkinson's State Court anti-arbitration Order because of the existence of Judge Greene's Federal arbitration Order. At the same time, Docutel-Olivetti is arguing to the Tenth Circuit that the FAA §4 issues were submitted to and resolved by Judge Wilkinson, and are, therefore, not properly in Federal Court. The impact, or lack thereof, of Judge Greene's Order on this appeal is set forth in Section V of this Reply Brief.

III. THIS COURT HAS JURISDICTION: THE ORDERS OF JUDGE WILKINSON ARE FINAL: THIS APPEAL IS ONE OF RIGHT.

In a calculated and intentional effort to side step the merits and substance of this appeal and contrary to Rule 24(k), U.R.A.P., Docutel-Olivetti, in Points II and III of its ARGUMENT [pages 18-32 of Respondent's Brief], presents, once more, its ill-founded and already four times rejected theories respecting the jurisdiction of the Utah Supreme Court over the present appeal.

A. Docutel-Olivetti's Attack on Jurisdiction is Untimely

Ignoring momentarily the prior orders of this Court vouchsafing jurisdiction, Docutel-Olivetti's present attack on jurisdiction can be rejected with finality because it is untimely. The interval of time during which a jurisdictional question may be raised by a party before the Utah Supreme Court is controlled by Rule 10(a), U.R.A.P., i.e.:

> (a) Time for Filing; Grounds for Motion. Within 10 days after the docketing statement is served, a party may move:
> (1) to dismiss the appeal ... on the basis that the Court has no jurisdiction;...

Docutel-Olivetti's present jurisdictional attack occurred on or about November 22, 1985, when Docutel-Olivetti's Brief was filed. However, the Docketing Statement of Systems and Brady was served on August 16, 1985. The time span between the two events is approximately 3 months, as opposed to the 10 day limit imposed by Rule 10(a) U.R.A.P. The apparent intent of Rule 10(a) is to require the presentation of bona fide jurisdictional questions to this

Court at a very early point in the appeal so that, if jurisdiction doesn't exist, the burden upon the Court and the parties can be immediately terminated.

The Utah Rules of Appellate Procedure provide no express exception to the 10 day restriction of Rule 10(a) and, therefore, the present [November 22, 1985] attack on jurisdiction is not timely.

While, in an appropriate case of manifest error, or complexity, or newly discovered evidence, this Court could belatedly [following the submission of briefs, for example], consider a bona fide issue of jurisdiction, such is not the case here. Docutel-Olivetti has merely reasserted the same old, stale, transparent, hollow, contrived and four times rejected arguments, in support of its present attack on jurisdiction.

B. Docutel-Olivetti's Arguments Respecting Jurisdiction are Frivolous

Docutel-Olivetti on June 24, 1985 conceded [in Federal Court] the appellate jurisdiction of the Utah Supreme Court as follows:

> Whatever else the May 24, 1985 State Court decision [i.e. the June 10, 1985 Order] is it is clear that it is not interlocutory....
>
> Section 78-31a-19 of the Utah Arbitration Act [The 1985 UAA] ... provides:
>
> "78-31a-19. An appeal may be taken ... from any court order:
>
> (1) denying a motion to compel arbitration."

> Judge Wilkinson's May 24, 1985 Order (sic) [May 10, 1985 Order] is appealable under §78-31a-19 U.C.A. and is not interlocutory. (Emphasis supplied; A.28).

Thus, Docutel-Olivetti cannot now be heard to contend it did not know, as of June 24, 1985, that the present matter is appealable as a matter of right, is not interlocutory and that this Court has jurisdiction.

The initial appeal in this matter was Docket 20783, filed prematurely on July 8,1985. On July 10, 1985, notwithstanding its aforementioned concessions in Federal Court, Docutel-Olivetti challenged the jurisdiction of this Court by filing a Motion to Dismiss Appeal [Docket 20783] contending the appeal was interlocutory and governed by Rule 5, U.R.A.P. [as opposed to Rule 4, U.R.A.P.]. (A.109,110). Docutel-Olivetti's assertions were rejected by this Court when it ruled that Appeal 20783 was governed by Rule 4 [Appeal as of Right], but was unacceptably premature. (A.111).

A new Notice of Appeal was, thereafter, timely filed in this matter, resulting in present Docket No. 20835. Again, Docutel-Olivetti filing a Motion to Dismiss Appeal 20835 on the same ground, i.e. that it was a Rule 5, U.R.A.P. interlocutory appeal. (A.112,113).

Docutel-Olivetti also argued that the 1985 UAA was not procedural and, therefore, not retroactive, contrary to the express language of the Bill maturing into the 1985 UAA. (A.79,116,117). No such argument was made by Docutel-Olivetti before the Trial Court.

The Utah Supreme Court on September 3, 1985 rejected Docutel-Olivetti's theories respecting its jurisdiction over the present appeal and denied Docutel-Olivetti's Motion to Dismiss in Docket 20835. (A. 118).

For a third time, Docutel-Olivetti made the same arguments respecting jurisdiction in its Memorandum in Opposition to Defendant's Motion for Stay Pending Federal Appeal, filed on or about September 19, 1985 in this Docket 20835. (A. 143). This third attack on jurisdiction was also rejected.

For a fourth time, Docutel-Olivetti, on the same grounds, challenged jurisdiction in its Memorandum in Support of Plaintiff-Respondent's Motions filed on or about September 18, 1985 in this Docket 20835. (A. 147). This jurisdictional attack was likewise rejected.

The arguments, now made for the fifth time, in support of Docutel-Olivetti's present [November 22, 1985] attack on jurisdiction are the same well-worn, but four times rejected contentions and have no more merit now than when they were four times earlier presented and rejected.

C. <u>This Appeal is One of Right and Judge Wilkinson's Orders are Final Orders</u>

This appeal is one of right and Judge Wilkinson's Orders of June 10, 1985 and July 19, 1985 are final orders for the reasons summarized below.

1. Docutel-Olivetti has accurately conceded and is bound by its earliery admission against present interest,

made by its counsel as an officer of the Court, before Judge Greene in this matter, i.e.:

> Judge Wilkinson's May 24, 1985 Order (sic) [June 10, 1985 Order] is appealable under §78-31a-19 U.C.A. and is not interlocutory. (A.28).

2. The decision of the State Trial Court was pursuant to the 1985 UAA, making this appeal one of statutory right. (R. 271). The State Trial Court's application of the 1985 UAA, cannot be reviewed on a jurisdictional-dismissal basis, where the Trial Court applied the 1985 UAA. Only by exercising the jurisdiction vested in this Court under the 1985 UAA and ruling on the merits of the appeal per se can this Court resolve the issue of whether Judge Wilkinson correctly applied the 1985 UAA.

3. The Utah Rules of Appellate Procedure make a distinction between appeals as of right, under Rule 4, U.R.A.P., and discretionary appeals from interlocutory orders, under Rule 5 U.R.A.P.

This Court applied Rule 4, U.R.A.P. [and, therefore, rejected Docutel-Olivetti's Rule 5 argument] in Docket 20783. The mandate in Appeal 20783 has been returned to the District Court and the Rule 4, U.R.A.P. dismissal Order (A. 111) is res judicata upon the parties as to the issues so decided.

4. The 1985 UAA applies in this matter because it is procedural by its terms, and, therefore, is retroactive. See page 36 of the Brief of Systems and Brady. Systems and

Brady, on May 24, 1985, asked the State Trial Court to apply the 1985 UAA and to grant them relief consisting of, among other things, an order of arbitration. (R. 274). Judge Wilkinson refused to compel arbitration and instead, in his June 10, 1985 anti-arbitration Order, compelled Systems and Brady to Answer Docutel-Olivetti's Complaint, in violation of the contract right of Systems and Brady that "all disputes" be arbitrated. Accordingly, Systems and Brady have appealed Judge Wilkinson's anti-arbitration order of June 10, 1985 and the companion Order of July 19, 1985, as a matter of statutory right under 78-31a-19, U.C.A., which states:

> An appeal may be taken by any aggrieved party as provided by law for appeals in civil actions from any court order:
> (1) denying a motion to compel arbitration.

5. Even if Docutel-Olivetti's argument that the pre-1985 UAA controls here were correct [which it is not], the anti-arbitration Orders of June 10, 1985 and July 19, 1985 are final orders [under the pre-1985 UAA when Lindon City v. Engineers Construction Company, 636 P.2d 1070 (Utah, 1985) is also considered] and, therefore, appealable as a matter or right because they deny, with finality, the contract right of Systems and Brady to arbitrate "all disputes".

6. Independent of the exact state statutory basis for jurisdiction in this appeal, the FAA and 28 U.S.C. § 1291 provide an independent jurisdictional basis where, as here,

the transactions in question impinge materially upon interstate commerce. The anti-arbitration decisions and Orders of Judge Wilkinson are final under federal statutes because they expressly undertake to deny Systems and Brady the right to arbitrate "all disputes" and because Judge Wilkinson reversibly failed to implement a stay order under FAA §3 respecting the FAA §4 arbitration issues placed in Federal Court.

7. The United States Supreme Court, in Southland Corporation v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed. 2d 1 (1984), has created controlling precedent and established a binding policy, applicable in the present matter, which requires that the Utah Supreme Court hear this appeal at the present time because Judge Wilkinson's anti-arbitration orders are final orders and the mentioned policy requires immediate review.

D. Even if the pre-1985 UAA and the 1985 UAA Do Not Confer Jurisdition, the FAA Does.

The argument of Docutel-Olivetti that the FAA supercedes [preempts] both the pre-1985 UAA and the 1985 UAA, if true (which it is not), does not deprive this Court of jurisdiction, because the FAA independently confers appellate jurisdiction upon this Court. Since this matter involves interstate commerce, the FAA applies to questions of jurisdiction in both federal and state courts.

More specifically, the U.S. Supreme Court, in Southland, supra, at 104 S. Ct. 856, 857 stated:

> ... the failure to accord immediate review of the decision of the California Supreme Court might "seriously erode federal policy." Plainly, the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration. The federal Act permits "parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible."
>
> Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate....
>
> ....
>
> For us [or any other appellate Court] to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate. (Citations omitted; Emphasis added.)

Under Southland, this Court is required to rule on the merits of present appeal and not, on a jurisdictional basis, deny the enforcement of the interstate commerce contract between the parties to arbitrate "all disputes" by allowing State Court litigation to first run its course.

IV. THE 1985 UAA ISSUES WERE PRESENTED TO THE TRIAL COURT AND THE RULING WAS PURSUANT TO THE 1985 UAA.

Docutel-Olivetti's argument that the 1985 UAA was not before the Trial Court is mythical and clearly erroneous. The Motion for Stay Pending Arbitration itself was filed to prevent default before 1985 UAA took retroactive effect, but was not noticed for hearing. It was expected that the FAA §4 issues would first be resolved in Federal Court, after which the parties would return to State Court for appropriate relief.

On May 2, 1985, Judge Bruce Jenkins asked that the State Court issues be heard first and continued the hearing on the Federal Court issues until May 31, 1985. Judge Jenkins asked that the State Court hearing be accelerated. Thus, time was short. (A. 7,8).

Docutel-Olivetti's overdue Memorandum respecting the Motion in question was not served by mail until May 16, 1985. There was insufficient time remaining before the May 24, 1985 hearing to file an additional memorandum.

Given the repeal of the pre-1985 UAA (A.79; R.74) and the retroactive implementation of the 1985 UAA, the only state statute available for Judge Wilkinson to rule upon was the 1985 UAA. If Judge Wilkinson had ruled under the repealed pre-1985 UAA (which he did not), such would have been clearly erroneous and reversible error.

At the May 24, 1985 hearing, the Motion of Systems and Brady was argued on the basis of the 1985 UAA and the Court was asked to not only grant a stay under the 1985 UAA and pursuant to FAA §3, but to order arbitration pursuant to the 1985 UAA. More specifically, Systems and Brady characterized an issue before Judge Wilkinson as follows:

1. Should this Court order arbitration? (R.274).

Systems and Brady also argued at the May 24, 1985 hearing:

> Since this action has been filed, and after Defendants filed their Motion ... the Utah Arbitration Act, 78-31A-1 became effective April 29, 1985 and Title 78 Chapter 31 has been repealed. The enrolled copy of Senate Bill 62 declares it to be "an act relating to the Judicial Code; providing a revised procedure for the enforement of written arbitration agreements."

It is well established in Utah that procedural statutes have retroactive effect.

> ... the legislature determined the new arbitration act as a procedural matter.... Defendants believe, therefore, that the new statute should be applied to these proceedings. (R.276).

The 1985 UAA was provided to the Trial Court. (R.74-83).

While professing a lack of information respecting the 1985 UAA, Docutel-Olivetti did not claim suprise and ask for a continuance to consider the 1985 UAA. Instead, Docutel-Olivetti waived any continuance available and submitted the matter at the May 24, 1985 hearing.

The July 22, 1985 uncontroverted Affidavit of John R. Merkling also confirms that the 1985 UAA was before Judge Wilkinson:

> 10. Based on the arguments which I heard before Judge Wilkinson, the issue of compelling arbitration under the new 1985 Utah Arbitration Act was explicitly raised and argued before Judge Wilkinson. (A.120).

The understanding of Docutel-Olivetti and its counsel is no different:

> Judge Wilkinson's May 24, 1985 Order (sic) [the June 10, 1985 Order] is appealable under §78-31a-19 U.C.A. and is not interlocutory. (A.28).

The same is confirmed by the Objection of Systems and Brady to the June 10, 1985 Order which states:

> 4. The [June 10, 1985] Order should state that the Utah Arbitration Act, 78-31a-1, et seq. was ... considered by the Court as controlling. (R.103).

In response to the above-mentioned Objection, Docutel-Olivetti did not in any way challenge the applicabi-

lity of the 1985 UAA, nor that the matter had been argued, submitted and ruled upon under the 1985 UAA. Docutel-Olivetti has conceded that Judge Wilkinson "ruled primarily on Utah law." (R.351).

On no occasion, at the trial level, did Docutel-Olivetti challenge the applicability of the 1985 UAA, nor object to the arguments of Systems and Brady that the 1985 UAA controls nor objected to the Court's ruling based on the 1985 UAA. Docutel-Olivetti has not appealed in this matter and may not at this late date raise for the first time a question as to whether the 1985 UAA was properly before the Trial Court.

V. THERE ARE ISSUES UPON WHICH THIS COURT IS REQUIRED TO RULE.

Docutel-Olivetti argues, again without citing any authority, that in light of the FAA, there are no issues upon which this Court can enter a ruling. This contention is based upon the erroneous position that the FAA, enacted in 1928, preempts the field, including the 1985 UAA. Such is simply not the law and never has been, any more than the federal securities laws pre-empt state securities laws. This Court can issue an arbitration order under state law, the scope of which is broader than required by Federal law, but it cannot award less relief than that provided by the FAA.

Also, Docutel-Olivetti addresses the August 8, 1985 FAA §4 Order of Judge Greene (A. 159-161) as if it were final in a res judicata sense. To the contrary, Judge Greene's Order has been appealed by both parties and both appeals have been reinstated. (A.107).

Furthermore, while calmly representing to this Court

that the arbitration issues under the FAA were properly before and decided in Federal Court, Docutel-Olivetti inconsistently in its Tenth Circuit Docketing Statement, has taken a contradictory posture, i.e.: that Systems and Brady submitted the FAA §4 issues to Judge Wilkinson in State Court. (A. 132-135).

Should Docutel-Olivetti prevail in the Federal contention that the FAA §4 issues were before Judge Wilkinson, the failure by Judge Wilkinson to apply FAA §4 would be squarely before the Utah Supreme court, under the Southland decision, which at 104 S.Ct. 859, 860, states:

> ... the substantive law the Act [FAA] created was applicable in state and federal court .... We thus read the underlying issue of arbitrability to be a question of substantive federal law: "... the [federal] Arbitration Act governs that issue in either state or federal court." ...
>
> ... the "involving commerce" requirement ... [is] not ... an inexplicable limitation on the power of the federal courts, but ... [is] intended to apply in state and federal courts. (Emphasis added; Citation Omitted.)

Thus, if the Tenth Circuit rules that the FAA §4 issues were before Judge Wilkinson Judge Wilkinson's failure to rule under FAA §4 is reversible error and this Court would have an uncompromised duty under Southland to then rule on the FAA §4 issues.

This situation is precisely why Systems and Brady, by Motion before the Utah Supreme Court, suggested the present appeal be stayed pending a decision by the Tenth Circuit.

Thus, the Utah Supreme Court has before it not only the 1985 UAA and other issues presented in the Brief of Brady and Systems, but may ultimately be obligated to decide all FAA §4 issues.

VI. SERVICE OF A SUMMONS IS NOT REQUIRED WHERE A MOTION FOR ARBITRATION IS MADE IN A PENDING PROCEEDING.

Docutel-Olivetti argues in its Brief, for the first time, that Systems and Brady's Motion regarding arbitration is deficient because it was not served by summons.

The purpose of a summons is elemental, i.e., service thereof confers initial jurisdiction upon the trial court. There are other ways of conferring jurisdiction, e.g. by stipulation or by a general appearance. However, once jurisdiction has been obtained, the court may act thereafter on all matters relevant to the proceeding.

Here, had jurisdiction not existed previously, the use of a summons under the 1985 UAA would have been appropriate to create jurisdiction. However, given the existing jurisdiction of the Trial Court pursuant to Docutel-Olivetti's Complaint and Summons, nothing more than the Motion to Stay Pending Arbitration was jurisdictionally needed preliminary to Judge Wilkinson's ruling under the 1985 UAA.

Had Docutel-Olivetti possessed a true objection to "service of process", that objection would have been raised below. It was not, and is, therefore, waived.

VII. DOCUTEL-OLIVETTI MISAPPLIES UTAH CONTRACT PRINCIPLES WITH REGARD TO ARBITRATION PROVISIONS.

Docutel-Olivetti erroneously characterizes paragraph 12 of its Agreement [which, with absolute specificity, provides that "all disputes" are arbitrable] as a "general" provision and, at the same time, characterizes paragraph 10 [which

refers to UCC remedies] as a "specific" provision. On this false premise, Docutel-Olivetti draws the misplaced conclusion that paragraph 10 must prevail over paragraph 12 because specific contract provisions control over general provisions.

Paragraph 12 of the Agreement, while broad in its scope, is neither general nor ambiguous under Utah law. Interpreting remarkably similar contract language in Lindon City, supra, this Court found that contract language providing that "... All claims, disputes and other matters in question arising out of or related to the CONTRACT DOCUMENTS or breach thereof ... shall be decided by arbitration ..." was "plain, clear wording."

The language in the Agreement before this Court in this case is just as plain, clear and specific. Resort to general principles of contract interpretation is not required. Under the Utah law "all disputes" means "all disputes" and arbitration is required.

Also, if there is any element of ambiguity, both state and federal law of contract interpretation requires that the contract be interpreted in favor of arbitration unless a clearly expressed intent not to arbitrate an issue can be found, which is not the case here. See Point I of Systems' and Brady's Brief and cases cited therein.

Docutel-Olivetti does not deal in any way with the policy argument found in Systems' and Brady's Brief, at Point I. The principles cited there refer specifically to interpretation of arbitration clauses. In summary, Federal and Utah policy require that arbitration provisions be interpreted

in favor of arbitration. General principles of contract law do not override the stated Federal and Utah policy.

Finally, Docutel-Olivetti's position is fundamentally flawed in characterizing paragraph 12 as "general" and paragraph 10 as "specific". Paragraph 12 is the only provision of the contract which deals specifically with forum selection for dispute resolution. It is, in fact, specific and not general. Under paragraph 12 "all disputes" arising out of Agreement or in any manner pertaining to the dealership are to be arbitrated. Paragraph 10 deals at most with remedies [as opposed to forums] available under the UCC. Reference to UCC remedies does not identify a forum for the enforcement of those remedies. It is, of course, true that parties to an arbitration agreement may waive their right to arbitrate and proceed in court, but where one party insists on the right to arbitrate, as here, that right must be upheld.

VIII. THERE IS NO UNIFORM COMMERCIAL CODE EXCEPTION TO ARBITRATION.

Docutel-Olivetti erroneously asserts that "credit claims are excluded from the general arbitration provision of the Agreement". Docutel-Olivetti fails to distinguish between remedies and tribunals [forums] for dispute resolution.

Remedies comprise damages, orders of specific performance, injunctions, etc. Tribunals comprise courts, administrative agencies and arbitration panels.

This distinction is carefully maintained by the Uniform

Commercial Code (UCC). There is no UCC exclusion of arbitration. Resort to a court is not compelled by the UCC. Docutel-Olivetti argues that there are references in U.C.A. 70A-2-723(3) to a "court" and not to arbitrators. This argument is entitled to no weight because U.C.A. 70A-1-201(1) states:

> "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined. (Emphasis supplied.)

An arbitration proceeding is certainly embraced by the UCC in the use therein of words such as "courts", "action", etc. The use in paragraph 10 of the Agreement of "remedies" available under the UCC is best understood by reference to U.C.A. 70A-1-201(34) which states that the term "remedy"

> ... means any remedial right to which an aggreived party is entitled with or without resort to a tribunal.

Docutel-Olivetti's analysis, therefore, is fundamentally flawed. Even by its own terms, the UCC is expansive enough to refer and to be applicable in arbitration as well as in state court.

Furthermore, the UCC is subordinate to the Agreement of the parties. Docutel-Olivetti's thesis that the UCC supersedes a contract to arbitrate is false. On the contrary, U.C.A. 70A-1-102(3) states:

> The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this

> act may not be disclaimed by agreement....
> (4) ... the words "unless otherwise agreed" or words of similar import ... [do] not imply that the effect of other provisions may not be varied by agreement.... (Emphasis added.)

By its very terms, therefore, the UCC is subordinate to a contract requirement to arbitrate disputes between merchants. In fact, arbitration finds its greatest application in commercial settings and is to be encouraged. There are numerous cases involving the UCC and arbitration. If there is an arbitration clause, the UCC does not prevent arbitration. See Medical Development Corp. v. Industrial Molding Corporation, 479 F.2d 345 (C.A. 10, 1973). The Court found, under the FAA and the California UCC, an unsigned arbitration provision was binding.

Also the 1985 UAA is a part of the UCC. See U.C.A. 70A-1-103, which states:

> Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant ... or other validating or invalidating cause shall supplement its provisions. (Emphasis added.)

The Utah UCC and the 1985 UAA must, therefore, be read as integrated and complimentary. The fact that Docutel-Olivetti in its own contract designated arbitration as the required forum or tribunal does not violate the UCC. The remedies of the UCC are as available to Docutel-Olivetti in arbitration as they are in a court.

In fact, Commercial Arbitration Rule 43, Appendix B-7 of Olivetti's Brief, states:

> The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties....

Docutel-Olivetti's boot strap argument that the UCC mandates resort to a court is ill-founded. As required by the Agreement, "all disputes" must, and should be, arbitrated notwithstanding the UCC.

IX. THE EXTENT OF BRADY'S PERSONAL LIABILITY IS SUBJECT TO ARBITRATION.

Docutel-Olivetti erroneously suggests that it may avoid the affect of its arbitration provision by merely suing Richard Brady personally under the Guaranty.

Docutel-Olivetti has sued Richard Brady on the grounds that he is the alter-ego of Systems and, consequently, a signatory to the Agreement itself. Clearly, if Brady is a party to the Agreement, Brady's liability is arbitrable under the Agreement.

Also, Systems is entitled to have "all disputes" arbitrated. The liability of Brady is contingent and is a dispute arising out of the Dealership Agreement. The liability, if any, of Systems must be first resolved in arbitration before Brady can be said to have liability.

In addition, the 1985 UAA requires that "issues" be submitted to arbitration. If the issue of liability of Systems is submitted to arbitration, that issue is removed from litigation as to all parties during arbitration.

Furthermore, although a writing memorializing an arbitration agreement is required by the 1985 UAA, it is not

necessary that it be an integrated writing or that a party seeking arbitration have earlier signed the writing. All that is required is that the arbitration provision be in writing. See, e.g. Medical Development Corporation, supra, cases cited therein.

Finally, Judge Greene of the Federal District Court has ordered that Brady be a party to the arbitration proceeding. Docutel-Olivetti submitted the issue of Brady's claim to arbitration to Judge Greene and Judge Greene has ruled that both Brady and Systems are entitled to arbitration. The Tenth Circuit appeal will resolve with finality the issue of Brady's right to arbitration.

X. DOCUTEL-OLIVETTI WAS REQUIRED TO PREPARE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Docutel-Olivetti suggests that Systems and Brady did not comply with Rule 4 of the Rules of Practice of the Third Judicial District and are, therefore, barred from arguing that the absence of findings of fact and conclusions of law is reversible error. The preparation of documents under Rule 4 here was the responsiblity of counsel for the party obtaining the ruling, namely counsel for Docutel-Olivetti. (R. 108,109).Systems and Brady complied with their obligations in objecting to the lack of Findings and Conclusions in District Court. (R. 102-104).

Findings of fact and conclusions of law are required because the Utah legislature, at U.C.A. 78-31a-4, has mandated that a court "shall determine those issues and

order or deny arbitration accordingly." (Emphasis provided.) Consequently, the District Court is under a legislative mandate to make its findings and enter its conclusions in conjunction with its resolution of issues. Its failure to do so here is reversible error.

XI. A WRIT OF MANDAMUS IS NOT REQUIRED TO OBTAIN A SUBSTITUTE RECORD ON APPEAL.

Docutel-Olivetti suggests that Systems and Brady have waived the Trial Court's error in not approving a substitute record because it did not bring a petition for a writ of mandamus. A writ of mandamus is a permissive remedy under Rule 65B and may be obtained where there is no other plain, speedy and adequate remedy. Moreover, mandamus is not available as a substitute for appeal. See Commercial Security Bank v. Phillips, 655 P.2d 678 (Utah, 1982) and Merrihew v. Salt Lake County Planning and Zoning Commission, 659 P.2d 1065 (Utah, 1983). Mandamus is an extraordinary remedy available in certain circumstances, but not here.

XII. DOCUTEL-OLIVETTI'S REQUEST FOR ATTORNEY'S FEES IS WITHOUT MERIT AND PREMATURE.

Docutel-Olivetti also requests attorney's fees under the Agreement, although Docutel-Olivetti is in continual breach of that Agreement by failing to proceed to arbitration. Docutel-Olivetti is not meritoriously entitled to attorney's fees, especially in light of its abusive procedural tactics. The issue of attorney's fees may be advanced by Docutel-Olivetti only when, and if, Docutel-

Olivetti prevails on the merits of its claim. The merits of Docutel-Olivetti's claim are not before this Court, were not before the District Court and should properly be in arbitration. Docutel-Olivetti is not presently entitled to an award of attorney's fees under its Agreement or on any other grounds.

CONCLUSION

Both state and federal law interpret agreements so as to favor to arbitration. Unless a particular disputes is explicitly and expressly excluded from arbitration, arbitration is to be ordered. This supports the state and federal policy of moving parties to an arbitration agreement out of court and into arbitration quickly and inexpensively. Docutel-Olivetti, unintimidated by its earlier rebuke and fine by this Court (A.108), continues to create numerous frivolous procedural roadblock. Docutel-Olivetti advances no meritorious reasons why the claims between the parties should not be arbitrated. The proceedings in this case underscore the wisdom of the rule enunciated by this Court in Lindon City, supra. This Court, therefore, should order arbitration of all disputes and stay the litigation below until the disputes are resolved in arbitration.

LYNN G. FOSTER
Attorney for Systems and Brady

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Reply Brief of Defendants-Appellants, postage prepaid, to Gordon R. McDowell, 4609 South 2300 East, Suite 104, Salt Lake City, Utah 84117, on this 2nd day of Jan., 1986.

SEPTEMBER TERM - NOVEMBER 5, 1985.

Before Honorable Monroe G. McKay, Honorable Stephanie K. Seymour, and Honorable John P. Moore, Circuit Judges, United States Court of Appeals

IN THE MATTER OF THE ARBITRATION BETWEEN DICK BRADY SYSTEMS, INC., a Utah corporation; RICHARD BRADY, and DOCUTEL-OLIVETTI CORPORATION,	)	
DICK BRADY SYTEMS, INC., a Utah corporation, and RICHARD BRADY,	)	
Plaintiffs-Appellees Cross-Appellants,	)	
v.	)	Nos. 85-2349 & 85-2460
DOCUTEL-OLIVETTI CORPORATION,	)	
Defendant-Appellant Cross-Appellee.	)	

This matter is before the court on the applications of appellant and cross-appellant to vacate our order of October 7, 1985, dismissing the appeal and cross-appeal.

Upon consideration thereof, motions are granted. We conclude that the notice of appeal and notice of cross-appeal were timely. It is ordered that the order and judgment entered October 7, 1985, is vacated insofar as it dismisses the appeal and cross-appeal. That portion of the order denying the defendant-appellant's application for an emergency stay of the district court's order remains in full force and effect.

It is further ordered that the mandate issued October 7, 1985, is recalled.

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

November 4, 1985

OFFICE OF THE CLERK

Lynn G. Foster
Attorney at Law
602 East Third South
Salt Lake City, Utah 84102

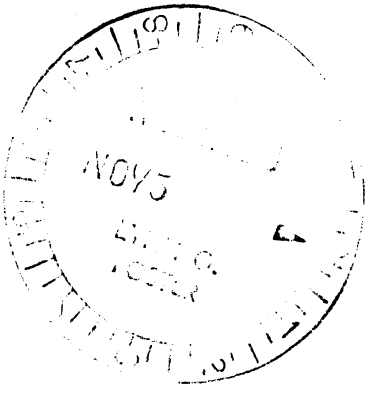
Docutel-Olivetti Corp.,
Plaintiff and Respondent,

v. No. 20835

Dick Brady Systems, Inc., Richard Brady and Does 1 through 10,
Defendants and Appellants.

Respondent's motion to remand to determine bond on appeal and to set dates for filing briefs, having been considered, it is hereby ordered that the same be, and hereby are both denied as frivolous and attorney for respondent is ordered to personally pay to the attorney for appellant the sum of $150 as and for attorney's fees forthwith.

Geoffrey J. Butler



Gordon R. Mc Dowell, Jr. #2180
Attorney for Plaintiff
4609 South 2300 East, Suite 104
Salt Lake City, Utah 84117
Telephone: (801) 272-0309

IN THE SUPREME COURT

FOR THE STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION,

Plaintiff-Respondent

vs.

DICK BRADY SYSTEMS, INC., et al.

Defendants-Appellant.

MOTION TO DISMISS APPEAL

3rd DISTRICT COURT
Civil No. C85-506

DOCKET NO.:

The Plaintiff hereby moves the Court to dismiss the appeal filed by the Defendants on the grounds that the case is not appealable because a final judgment has not been entered in this matter on the Plaintiff's Complaint, and this appeal is interlocutory in nature. Furthermore, the Appellant has not filed a supersedas bond and the appeal would in effect act as a stay of the Plaintiff-Respondent's right to have judgment entered on its credit claims asserted in the Complaint.

Dated this 10 day of July, 1985.

Gordon R. Mc Dowell, Jr.
Attorney for Plaintiff-Respondent

GORDON R. MC DOWELL, JR
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

MAILING CERTIFICATE

The undersigned hereby certifies that she mailed a true and correct copy of the foregoing Motion to Dismiss Appeal to the defendants-appellants herein, by placing said copy thereof in the United States mail, postage prepaid thereon, addressed to defendants' attorney of record as follows:

Lynn G. Foster
Attorney at Law
602 East Third South
Salt Lake City, UT 84102

this 10 day of July, 1985.

Gayla R. Casper, Secretary

GORDON R. MC DOWELL, JR
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

August 6, 1985

OFFICE OF THE CLERK

Lynn G. Foster, Esq.
John R. Merkling, Esq.
602 East 3rd South
Salt Lake City, Utah 84102

Docutel Olivetti Corporation,
Plaintiff and Respondent,
v.
Dick Brady Systems, Inc., et al.,
Defendants and Appellants.

No. 20783

THIS DAY, Respondent's motion to dismiss this appeal on the ground that the Order appealed is not a final order is hereby granted, and the appeal is dismissed. The notice of appeal was filed while objections to the order were pending in the district court, and the notice had no effect under Rule 4(b), Utah Rules Appellate Procedure.

Geoffrey J. Butler, Clerk

Gordon R. Mc Dowell, Jr. #2180
Attorney for Plaintiff-Respondent
4609 South 2300 East, Suite 104
Salt Lake City, Utah 84117
Telephone: (801) 272-0309

IN THE SUPREME COURT

FOR THE STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION, Plaintiff-Respondent, vs. DICK BRADY SYSTEMS, INC., et al. Defendants-Appellants.	MOTION TO DISMISS APPEAL THIRD DISTRICT COURT Civil No. C85-506 DOCKET NO.: 20835

The Plaintiff-Respondent hereby moves the Court to dismiss the appeal filed by the Defendants-Appellants on the grounds that the case is not appealable because a final judgment has not been entered in this matter on the Plaintiff's Complaint, and this appeal is interlocutory in nature. Furthermore, the Appellant has not filed a supersedas bond and the appeal could in effect act as a stay of the Plaintiff-Respondent's right to have judgment entered on its credit claims asserted in the Complaint.

DATED this 20th day of August, 1985.

Gordon R. Mc Dowell, Jr.
Attorney for Plaintiff-Respondent

GORDON R. MC DOWELL, JR.
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

CERTIFICATE OF MAILING

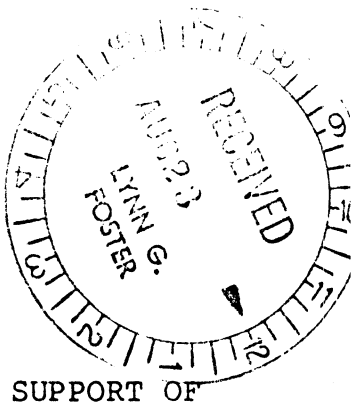
The undersigned hereby certifies that she mailed a true and correct copy of the foregoing Motion to Dismiss Appeal to the Appellants herein, by placing said copy thereof in the United States mail, postage prepaid thereon, addressed to Appellants' attorney of record as follows:

Lynn G. Foster
Attorney at Law
602 East Third South
Salt Lake City, UT 84102

this 22nd day of August, 1985.

GORDON R. MC DOWELL, JR.
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

Gordon R. Mc Dowell, Jr. #2180
Attorney for Plaintiff-Respondent
4609 South 2300 East, Suite 104
Salt Lake City, Utah 84117
Telephone: (801) 272-0309



IN THE SUPREME COURT OF

THE STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION, Plaintiff-Respondent, vs. DICK BRADY SYSTEMS, INC., et al. Defendants-Appellants.	MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS APPEAL DOCKET NO. 20835

GORDON R. MC DOWELL, JR.
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

Plaintiff and Respondent Docutel-Olivetti Corporation submits the within Memorandum in Support of its Motion to Dismiss the appeal herein.

STATUS OF THE PROCEEDINGS TO DATE

On January 24, 1985 Respondent filed its Complaint in the Third Judicial District Court against Dick Brady Systems, Inc. and against Richard Brady. That Complaint is a credit collection claim alleging in substance that Dick Brady Systems, Inc. had refused to pay for goods had and received by it from Respondent. Richard Brady was sued on a personal guaranty in which he guarantee the debts of Dick Brady Systems, Inc.

The Appellants were served with process on January 26, 1985 and on February 12, 1985 the Appellants filed a Motion for Dismissa or Stay of Proceedings Pending Arbitration. Appellants' Motion was heard on May 24, 1985 and on June 10, 1985 Judge Homer F. Wilkinsor entered his order denying Appellants' Motion to Dismiss the pro-

ceedings and further denied the Motion to Stay the proceedings pending arbitration.

On July 8, 1985 Appellants filed their Notice of Appeal of the June 10, 1985 Order and that appeal was assigned Docket No. 20783. The Notice of Appeal was filed in 20783 prior to entry by the court of its Order dated July 19, 1985 on Appellants' Motion to Reconsider the June 10, 1985 Order. On July 10, 1985 Respondent filed a Motion to Dismiss Appeal with the Supreme Court in Case No. 20783 and on August 6, 1985 the Supreme Court entered its Order granting Respondent's Motion to Dismiss Appeal and dismissed Appellants' appeal in Case No. 20783. On or about August 8, 1985 Appellant again filed a Notice of Appeal of the District Court's June 10, 1985 Order and that appeal has been assigned the within number 20835.

On or about June 14, 1985 Appellants filed its Answer and Counterclaim in the Third District Court. Respondent has responded to that Counterclaim. Appellants have refused to grant any discovery in the District Court on the grounds that its various notices of appeal divested the District Court of jurisdiction. Respondent has asked the District Court to compel Appellants to grant discovery. Appellants are resisting that motion on the grounds that the District Court does not have any further jurisdiction in the case because of the pending appeal herein.

GORDON R. MC DOWELL, JR.
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

ARGUMENT

There Is No Final Judgment Or Order From Which An Appeal Herein Might Lie

Rule 4 U.R.A.P. provides for an appeal of final judgments or orders. It is hard to imagine any proceedings less final than the proceedings presently pending before the District Court. The parties have barely gotten beyond the pleading stages therein and Appellants have even refused to grant discovery to Respondent.

The Utah Arbitration Act Effective April 1, 1985 §78-31a-1 et. seq. Does Not Grant Appellant The Right To Appeal Herein

Appellants rely on §78-31(a)-19 U.C.A. as confering jurisdiction on the Supreme Court for its appeal. §78-31(a)-19 does not by its terms provide an appeal of an order denying a Motion to Dismiss a Complaint nor from an order requesting a stay of proceedings. Moreover, §78-31(a)-19 provides that an appeal may be taken "as provided by law for appeals." The law providing for appeals is found in Rule 4 U.R.A.P., appeal from a final judgment or order of a court; and in Rule 5 U.R.A.P. providing for interlocatory appeals. As pointed out above, the proceedings before the District Court below are anything but final. Nothing in the Utah Arbitration Act permits an immediate appeal from denial of a Motion to Dismiss a Complaint or denying a motion to stay the proceedings below. Appellants may ask the Court to review the matter under Rule 5 U.R.A.P. but have failed to do so.

The Utah Arbitration Act became effective after Respondent's Complaint was filed and served in the proceedings below. The Utah Arbitration Act in existence prior to §78-31(a) et. seq. did not contain the appeal provisions of §78-31(a)-19. If that section is

GORDON R. MC DOWELL, JR.
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

a rule of substantive law mandating immediate appeals depriving the District Court of further jurisdiction in the matter, then that section does not apply to the case herein which was on file before the effective day of the Act.

CONCLUSION

For the reasons set forth above the Court should enter its order dismissing Appellants' Appeal herein.

DATED: August 22, 1985

Gordon R. Mc Dowell, Jr.
Attorney for Plaintiff-Respondent

GORDON R. MC DOWELL, JR.
4609 SOUTH 2300 EAST, SUITE 104
SALT LAKE CITY, UTAH 84117

CERTIFICATE OF MAILING

The undersigned hereby certifies that she mailed a true and correct copy of the foregoing Memorandum in Support of Respondent's Motion, etc. to the Appellants herein, by placing said copy thereof in the United States mail, postage prepaid thereon, addressed to Appellants' attorney of record as follows:

Lynn G. Foster
Attorney at Law
602 East Third South
Salt Lake City, UT 84102

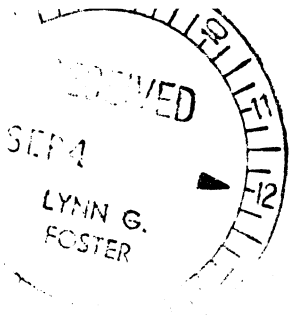
this 22nd day of August, 1985.

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

September 3, 1985



OFFICE OF THE CLERK

Lynn G. Foster, Esq.
John R. Merkling, Esq.
602 East 3rd South
Salt Lake City, Utah 84102

Docutel Olivetti Corporation,
Plaintiff and Respondent,

v. No. 20835

Dick Brady Systems, Inc.,
and Richard Brady,
Defendants and Appellants.

Respondent's motion to dismiss appeal, having been considered, it is hereby ordered that the same be, and hereby is, denied and the case is advanced on the calendar. All briefing is to be accomplished within 60 days.

Geoffrey J. Butler

LYNN G. FOSTER, #1105
JOHN R. MERKLING, #2239
Attorneys for Defendants
602 East Third South
Salt Lake City, Utah 84102
Telephone: (801) 364-5633

IN THE SUPREME COURT OF

THE STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION, Plaintiff, Respondent, vs. DICK BRADY SYSTEMS, INC., et al., Defendants, Appellants.	AFFIDAVIT OF JOHN R. MERKLING Docket No. 20783

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

John R. Merkling, having been first duly sworn deposes and says:

1. I am an attorney for the Petitioners in the above-entitled matter.

2. On the 24th of May, 1985, I was present at a hearing on Defendants' Motion entitled "Motion for Dismissal or Stay of Proceedings Pending Arbitration".

3. I heard the arguments presented to the court by Lynn G. Foster on behalf of Defendants Dick Brady Systems, Inc. and Richard Brady, and the arguments presented by Gordon McDowell on behalf of Plaintiff Docutel-Olivetti Corporation.

4. Prior to the hearing, I had prepared an extensive typed outline of an argument for Mr. Foster's use at the time of hearing.

In the ordinary course of business, Mr. Foster, to my personal knowledge, supplemented my extensive outline, in his own handwriting and before the hearing.

5. I am personally familiar with and have knowledge of the typed notes which I prepared and the supplementary handwritten notes which Mr. Foster prepared. I examined them both before and after the hearing on May 24, 1985.

6. Attached hereto as Exhibit "A" is the first page of the notes referred to which are in the handwriting of Mr. Lynn G. Foster. I saw this page both before and after the hearing before Judge Wilkinson.

7. In connection with the hearing, Mr. Foster read extensively from the notes which he and I had prepared.

8. I recall hearing Mr. Foster, in commencing the argument, read from Exhibit "A" and explicity call the Court's attention to the issue of whether the Court should order arbitration.

9. Later during Mr. Foster's argument, based upon the aforementioned notes, Mr. Foster called Judge Wilkinson's attention explicity to the applicability of the 1985 Utah Arbitration Act, U.C.A. 78-31a-1, et seq., which had become effective on April 29th, 1985.

10. Based on the arguments which I heard before Judge Wilkinson, the issue of compelling arbitration under the new 1985 Utah Arbitration Act was explicity raised and argued before Judge Wilkinson.

DATED this 22 day of July, 1985.

JOHN R. MERKLING

Subscribed and sworn to before me on this 23rd day of July, 1985.

NOTARY PUBLIC
My Commission Expires: 2-15-87

SHERI ANN MONCRIEF
NOTARY PUBLIC
[SEAL]
Commission Expires
Feb. 15, 1987
State of Utah

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Affidavit of John R. Merkling, postage prepaid, to Gordon R. McDowell, Jr., 4609 South 2300 East, Suite 104, Salt Lake City, Utah 84117, on this 23rd day of July, 1985.

Sandy K. Petersen

Issues

There are only three issues raised by Do' Motion & Ao' Motion the only matter properly noticed and properly before the Court.

Issues

1. Should this Court order arbitration
2. ~~~~ stay or dismiss the present suit pending the outcome of the present arbitration.
3. Can the P proceed in this action against Richard Body alone, as guarantor, concurrently while the arbitration between Olivetti and the S corp. proceeds.

While the P has attempted, using a backdoor approach, TO raise other issues - those are not properly raised and are not properly before the Court

e.g. a prejudgment attachment and the site where arb. is to take place.

Exhibit "A"

LYNN G. FOSTER, #1105
JOHN R. MERKLING, #2239
Attorneys for Defendants
602 East Third South
Salt Lake City, Utah 84102
Telephone: (801) 364-5633

IN THE SUPREME COURT OF THE

STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION,	:	
Plaintiff,	:	AFFIDAVIT OF LYNN G. FOSTER
vs.	:	Docket No. 20783
DICK BRADY SYSTEMS, INC., RICHARD BRADY and DOES 1 through 10,	:	
Defendants.	:	

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Lynn G. Foster, being first duly sworn, deposes and states:

1. I am an attorney for the Defendants in the above-entitled matter.

2. On May 24, 1985, Defendants' motion for an order compelling arbitration entitled "Motion for Dismissal or Stay of Proceedings Pending Arbitration" was heard by Judge Homer J. Wilkinson.

3. Defendants' Motion had been filed prior to the effective date of the present Utah Arbitration Act, U.C.A. 78-31A-1, et seq. However, on the date of the hearing the new [1985] Utah Arbitration Act was effective. This fact was brought to the attention of the Court and the ruling of the Court was based on the Court's

understanding of that Act.

4. On May 24, 1985, Judge Wilkinson announced his decision from the bench denying Defendants an Order compelling arbitration. Counsel for the Plaintiff, Gordon R. McDowell, Jr., was ordered to prepare an Order. A copy of a first minute entry is attached hereto as Exhibit "A" and incorporated herein by reference.

5. On about May 29, 1985, Mr. McDowell submitted a proposed Order. A copy of a first proposed Order attached hereto as Exhibit "B" and incorporated herein by reference.

6. On about May 31, 1985, Defendants filed an "Objection to Proposed Order and Motion to Clarify", pursuant to Rule 4 of the Rules of Practice in the Third Judicial District Court, which requires objections to a proposed Order to be filed within five days of the submission of the proposed Order [and, therefore, before an Order is signed or entered]. A copy of Defendants' Objection to the proposed Order and Motion to Clarify is attached hereto as Exhibit "C" and incorporated herein by reference.

7. A hearing on Defendants' objections was immediately scheduled and noticed for June 21, 1985. A copy of a Notice of Hearing is attached hereto as Exhibit "D" and incorporated herein by reference.

8. It is the usual practice of the District Court to hold a proposed Order for a particular length of time, usually eight days, and, if no objection is filed within that period of time, to sign the proposed Order. If an objection is filed within the stated period, it is the practice of the District Court to hold the Order until the objection is heard.

9. Through a clerical error at the District Court, Defendants' objections to the proposed Order were not brought to the attention of Judge Wilkinson. Consequently, contrary to the practice of the District Court, Judge Wilkinson signed Plaintiff's proposed Order on June 10, 1985 [the June 10 Order]. A copy of the June 10 Order is attached hereto as Exhibit "E" and incorporated herein by reference.

10. After the Order was signed, Defendants did not explicitly file a Motion under Rule 52(d) or Rule 59(e), both of which contemplate a Motion filed after the entry of judgment.

11. On June 21, 1985, Judge Wilkinson heard Defendants' objections to the first Order, as well as other motions of the parties not relevant at this time.

12. From the bench, Judge Wilkinson rendered his decision and ruled explicity that Rule 52 did not apply in this situation. I was instructed to prepare a proposed Order respecting the June 21, 1985 hearing [second proposed Order]. A copy of a second Minute Entry is attached hereto as Exhibit "F" and incorporated herein by reference.

13. On June 24, 1985, Defendants submitted the second proposed Order. A copy of the second proposed Order is attached hereto as Exhibit "G" and incorporated herein by reference.

14. On June 26, 1985, Plaintiff objected to Defendants' second proposed Order and filed a proposed Order on behalf of Plaintiffs [third proposed Order]. A copy of the third proposed Order is attached hereto as Exhibit "H" and incorporated herein by reference.

15. During the next week to ten days, I personally contacted Judge Wilkinson's clerk on more than one occasion to determine if either the second or the third proposed Order had been signed by the Judge. I was informmed by Judge Wilkinson's clerk that Judge Wilkinson was suffering from an illness which was interferring with the completion of certain matters, including this matter.

16. Because Defendants' original objections to the June 10 Order were filed under Rule 4 of the Rules of Practice of the District Court, and because Judge Wilkinson had explicitly stated that Rule 52, in his opinion, did not apply, Defendants filed their Notice of Appeal on July 9, 1985, within thirty days of the signing and entry of the first Order and after the District Court had rendered all decisions appealed from. A copy of the first Notice of Appeal is attached hereto as Exhibit "I" and incorporated herein by reference.

17. On July 19, 1985, after Judge Wilkinson had recovered and returned to the bench, Judge Wilkinson modified and signed the third proposed Order [the July 19 Order]. A copy of the signed Order is attached hereto as Exhibit "J" and incorporated herein by reference.

18. On July 31, 1985, Defendants filed an Amended Notice of Appeal as to both the June 10 and the July 19 Orders, specifically pointing out those portions of the July 19 Order appealed from. A copy of the Amended Notice of Appeal is attached hereto as Exhibit "K" and incorporated herein by reference.

19. The facts that the District Court had signed a proposed Order before hearing timely filed objections, contrary to its usual practice, that Defendants were proceeding properly under Rule 4 of the Rules of Practice of the District Court and not explicitly under Rule 52 or Rule 59(e) of the Utah Rules of Civil Procedure, and that Judge Wilkinson expressly ruled that Rule 52 did not apply, made the proper date for filing a Notice of Appeal questionable. It appears that Rule 4(c), of the Appellant Rules, controls. On July 9, when the Notice of Appeal was filed by Defendants in this matter, all decisions appealed from had been rendered by the District Court, although a portion of the decision rendered still needed to be reduced to writing. I am of the view that Rule 4(c) does apply and that the original Notice of Appeal was proper and timely.

20. On July 31, 1985, Defendants filed an Amended Notice of Appeal, particularly pointing out those portions of Judge Wilkinson's June 21, 1985 ruling to which Defendants objected, as embodied by the July 19 Order. Even if Rule 4(b) U.R.A.P. were applicable to these proceedings (and I believe it is not), any defect was cured by the filing of the Amended Notice of Appeal on July 31, 1985.

21. On or about July 10, 1985, Plaintiff-Respondent, ignoring the requirement that the Docketing Statement be on file, filed a Motion to Dismiss the Appeal on the erroneous grounds that the appeal was "interlocutory" (that is, discretionary under Rule 5 U.R.A.P.) and that Defendants had not filed a supersedeas bond. Plantiff did not file a memorandum in support of its motion.

22. Appellants-Defendants responded to the Motion of Plaintiff-Respondent and to additional allegations made by Plaintiff in Plaintiff's reply Memorandum.

23. This Court has not sustained any of the arguments for dismissal advanced by Plaintiff.

24. On August 6, 1985, this Court [apparently on its own motion] dismissed this Appeal pursuant to Rule 4(b) U.R.A.P. Defendants have not had an opportunity to be heard and present arguments in opposition to dismissal under Rule 4(b) U.R.A.P.

25. After Defendants' Notice of Appeal was filed, and before the Supreme Court entered any Order of Dismissal, Plaintiff has attempted to proceed with discovery and has asserted that it has accrued various discovery rights during this period. Unless this appeal is reinstated, Defendants may suffer substantial prejudice regarding their rights, and will certainly have to defend against Plaintiff's assertion of its claims at additional costs and delay. Plaintiff's counsel has already indicated his intention to raise these issues in a letter dated August 12, 1985, a copy of which is attached hereto as Exhibit "L" and incorporated herein by reference. These circumstances represent just cause for reinstating this appeal.

26. Immediately upon receiving a copy of the August 6, 1985 Order, Defendants filed a further new (third) Notice of Appeal on August 8, 1985, paying additional filing and docketing fees. A copy of the August 8, 1985 Notice of Appeal showing payment of the additional fees is attached hereto as Exhibit "M" and incorporated herein by reference. A receipt for the additional docketing fee has

not yet been received from the clerk of the Supreme Court.

FURTHER Affiant sayeth naught.

LYNN G. FOSTER

Subscribed and sworn to before me on this 15TH day of August, 1985.

JOHN R. MERKLING
NOTARY PUBLIC
STATE OF UTAH
[SEAL]

NOTARY PUBLIC
Commission Expires:

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Affidavit of Lynn G. Foster to Gordon R. McDowell, Jr., 4609 South 2300 East, Suite 104, Salt Lake City, Utah 84117, on this 15th day of August, 1985.

Gordon R. Mc Dowell, Jr. #2180
Attorney for Defendant-Appellant
4609 South 2300 East, Suite 104
Salt Lake City, Utah 84117
Telephone: (801) 272-0309

UNITED STATE COURT OF APPEALS

FOR THE TENTH CIRCUIT

IN THE MATTER OF THE ARBITRATION BETWEEN DICK BRADY SYSTEMS, INC., a Utah corporation, and RICHARD BRADY,

Plaintiffs-Appellees,

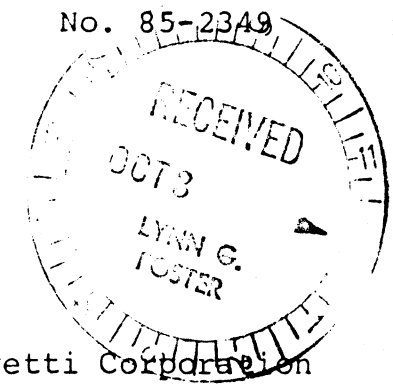
vs.

DOCUTEL-OLIVETTI CORPORATION,

Defendant-Appellant.

DOCKETING STATEMENT

No. 85-2349



Defendant and Appellant Docutel-Olivetti Corporation ("Appellant") pursuant to Rule 8 of the Rules of Court of the United States Court of Appeals for the Tenth Circuit submits the within Docketing Statement.

(a)

STATEMENT OF THE NATURE OF THE PROCEEDINGS

This is an appeal from a final order of the United States District Court for the Central District of Utah ordering arbitration under 9 U.S.C. §4, enjoining prosecution of certain claims in the state courts of the State of Utah, ordering arbitration in Salt Lake City, Utah, and ordering other arbitration proceedings pending in Dallas, Texas transferred to Salt Lake City, Utah and consolidated with arbitration proceedings ordered in the order appealled herein.

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SALT LAKE CITY, UTAH 84117

(b)

STATEMENT OF FACTS

1. On February 22, 1982 Appellant's predecessor in interest, Olivetti Corporation, and Dick Brady Systems, Inc. ("DBS"), Appellee herein, entered into a Dealership Agreement which contained an Arbitration Agreement which provided a forum selection clause as follows:

> "The arbitration hearing shall be conducted at the regional office of A.A.A. closest to the principal office of the party against whom arbitration is demanded, unless Olivetti and Dealer agree upon a different location."

2. The regional office of the A.A.A. closest to Appellant's principal office is Dallas, Texas. The regional office of the A.A.A. closest to DBS principal office is Denver, Colorado. There is no office of the A.A.A. in Utah.

3. Appellant has never agreed to arbitration in any location other than as called for in the Dealership Agreement.

4. On or about March 8, 1985 DBS and Richard Brady ("Brady"), another Appellee herein, filed a Demand for Arbitration with the American Arbitration Association in Denver, Colorado asserting claims against Appellant and asking for unspecified monetary damages. Appellant has never demanded arbitration against DBS. Appellant responded to the demand and commenced to participate in arbitration proceedings in connection with the claims asserted by DBS against Appellant. On May 2, 1985 Appellees filed a Change of Claim with the A.A.A. asserting specific claims against Appellant. Appellant responded to that Change of Claim.

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5. After seeking input from DBS and Appellant concerning the appropriate location for the arbitration proceedings, the A.A.A. transferred the proceedings to Dallas, Texas.

6. On or about February 22, 1982 Brady executed a personal guaranty guaranteeing payment to Appellant's successor Olivetti Corporation, of all indebtedness incurred by DBS for amounts due for merchandise and services.

7. On January 24, 1985 Appellant filed a Complaint in the Third Judicial District Court, State of Utah ("State Court Action" hereafter) against DBS and Brady for payment of goods sold and delivered to DBS.

8. On or about February 12, 1985 DBS and Brady filed a motion in the State Court Action based on the Utah Arbitration Act 78-31-1 et. seq. Utah Code Annotated and the Federal Arbitration Act 9 U.S.C. §1 et. seq. for an order dismissing the Complaint or staying its prosecution pending arbitration on the grounds that the claim was subject to the arbitration provision of the Dealership Agreement between Appellant and DBS and that Brady individually was entitled to protection of that agreement.

9. On or about March 8, 1985 DBS and Brady filed a document encaptioned "Petition to Compel Arbitration" in the United States District Court for the Central District of Utah, the trial court whose orders are appealled herein. Although encaptioned as a Petition to Compel Arbitration, the petition and relief requested was limited to orders enjoining litigation by Appellant, directing that arbitration proceedings take place in Salt Lake City, Utah,

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and requesting a specific method of appointing arbitrators. DBS and Brady subsequently withdrew their request for a specific method of appointing arbitrators. By its terms the subject matter of the Petition was limited to alleged controversies asserted in Appellant's State Court Action Complaint.

10. On May 2, 1985 a hearing on Appellees' Petition to Compel Arbitration was held before the Honorable Bruce Jenkins in the district court below. Judge Jenkins having been advised that Appellees had already filed a motion to dismiss or stay the proceedings in the State Court Action, directed Appellees to call up their motion before the state court. Judge Jenkins then continued the hearing until May 31, 1985.

11. On May 24, 1985 Appellees' motion to dismiss or stay proceedings was heard in the State Court Action by the Honorable Homer F. Wilkinson. After considering the matters and arguments presented to the court, the court ruled that the specific language of the Dealership Agreement with reference to collection matters took precedence over the general arbitration clause in the Agreement and that therefore the claims asserted by Appellant in its State Court Action Complaint were not arbitrable.

12. Sometime after May 2, 1985 the case below was transferred from Judge Jenkins to the Honorable J. Thomas Greene. Appellees, having learned of the transfer, renoticed a hearing on their petition before Judge Greene.

13. On May 30, 1985 Judge Greene heard arguments on Appellees petition and over objection by Appellant that Appellees had

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submitted the issue to the state court, which had decided the issue, Judge Greene ordered full briefing on the petition and continued the hearing to June 27, 1985.

14. On June 21, 1985 Appellant filed a Motion to Stay Proceedings Pending State Court Determination of Arbitrability Issues.

15. On June 27, 1985 Judge Greene heard arguments on Appellees petition and Appellant's motion to stay and after arguments announced his decision from the bench on that date, which was subsequently reduced to writing on August 8, 1985 and is the order appealled herein.

16. On July 12, 1985 Appellant filed a Motion to Stay Order Re Transfer of Arbitration Proceedings with the district court below. That motion was set for hearing on August 22, 1985.

17. On August 8, 1985 the trial court below entered its findings of fact, conclusions of law and order appealled herein. Judge Greene stayed the effective date of the transfer order until August 22, 1985 pending a hearing on the motion to stay.

18. On August 22, 1985 Appellant filed a Motion to Alter or Amend Judgment (Rule 59 F.R.C.P.) with the district court.

19. At the August 22, 1985 hearing on Appellant's motion to stay, Judge Greene continued the hearing until September 9, 1985 and consolidated that hearing with the hearing of Appellant's Rule 59 motion. Judge Greene continued the stay of the effective date of the transfer order contained in the August 8, 1985 order to September 9, 1985.

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20. On September 9, 1985 Judge Greene heard arguments on Appellant's motion to stay and on its Rule 59 motion and ruled from the bench denying both motions. This appeal followed. Judge Greene's September 9, 1985 ruling was reduced to writing on September 19, 1985.

(c)

QUESTIONS PRESENTED

Following are the principal questions presented on this appeal. Other questions may arise during preparation of the briefs herein.

1. Does a forum selection clause of an arbitration agreement preclude the court from ordering arbitration in its own district if that district is not the forum selected?

2. Does the trial court have the power to disregard the forum selected in a forum selection clause of an arbitration agreement over the objections of one of the parties to the agreement regardless of countervailing or compelling circumstances which might warrant such a change if the agreement were a commercial contract rather than an arbitration agreement?

3. If a petition to compel arbitration is filed in a forum other than the forum selected in a forum selection clause of an arbitration agreement, must that court dismiss the petition?

4. If the trial court can engage in consideration of countervailing or compelling circumstances in disregarding a forum selection clause in an arbitration agreement, does the filing of a state court complaint on claims which a state court judge ruled

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were not arbitrable, and responding to a petition to compel arbitration filed in the district court, constitute such compellin and countervailing circumstances justifying disregarding the forum selected?

5. Can a party who submitted a Federal Arbitration Act motion to stay proceedings before a state court nevertheless submit the same claim to a federal court where the state court refused its motion?

6. Based on Appellees' submission of the issues for a stay of proceedings to the state court, did the federal court err in refusing to stay its own proceedings?

7. Does the district court have the power under either §3 or §4 of the Federal Arbitration Act, 9 U.S.C. §1 et. seq. to enjoin either the parties or the court in proceedings pending in a state court?

8. Where a party has consented and is participating in arbitration proceedings on claims asserted against it, did the district court err in ruling that the party refused to arbitrate claims under 9 U.S.C. §4 where the court finds that some allegations in a state court complaint which has as its nexus a credit collection claim, could be construed as asserting arbitrable issues even though the court finds that the nexus of the complaint is not arbitrable?

9. Where arbitration proceedings are already pending in Dallas, Texas in which appellant is participating, may a federal district court in Salt Lake City, Utah, notwithstanding a forum

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selection clause of an arbitration agreement which does not provide for arbitration in Utah, order consolidation of those proceedings in its own district with other matters which it ordered arbitrated in Utah?

10. Did the court err in compelling appellant to assert claims against appellees even if appellant elects not to assert those claims, and then order those claims arbitrated in Salt Lake City, Utah notwithstanding a forum selection clause in an arbitration agreement which does not provide for arbitration in Salt Lake City, Utah?

11. Does a party to an arbitration agreement submit itself to the jurisdiction of the federal district court by filing a credit collection complaint in state court against the other party to the agreement, where the arbitration agreement requires arbitration outside the jurisdiction of the federal district court?

12. Does an alter ego allegation in a state court complaint which has as its nexus a credit collection claim, empower the court to order a party to arbitrate claims with an individual even though that individual has no arbitration agreement with the party and has in fact denied the alter ego allegation in his answer to the state court complaint?

13. Did the court err in enjoining prosecution of a claim against an individual who signed a personal guaranty guaranteeing payment of obligations of a party to an arbitration agreement, where that individual is not a party to the arbitration agreement, and the guaranty permits suit against the guarantor without the

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necessity of suit against the principal obligor?

14. Did the court err in ordering arbitration of claims where the petition filed by appellees did not ask for such relief and requested merely that arbitration proceedings on claims it asserted be held in Salt Lake City, Utah and asked for an injunction of claims asserted by appellant in state court?

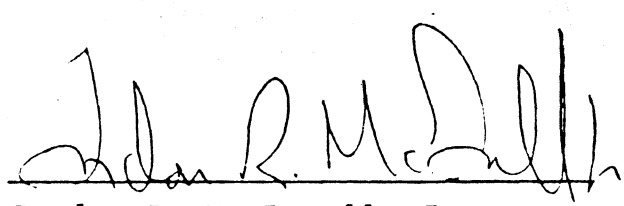
15. Is the court's order enjoining litigation of "any and all disputes between the parties" over broad to the extent it does not specify which disputes are to be enjoined?

16. Did the court err in enjoining appellant's alter ego claim in the state court action and did it err in compelling appellant to assert that claim in arbitration?

17. Absent a determination by the state court that any part of the First and Second Causes of Action of the State Court Complaint assert claims different from those arising under separat credit agreements between appellant and DBS, i.e. arbitrable claim are any valid issues ordered arbitrable which can be consolidated with the arbitration proceedings pending in Dallas, Texas justifying transferring those proceedings to Salt Lake City, Utah?

18. Is the court's arbitration order invalid because it lacks specificity as to what issues are to be arbitrated?

DATED: October 1, 1985



Gordon R. Mc Dowell, Jr.
Attorney for Defendant-Appellant

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PROOF OF SERVICE

The undersigned hereby certifies that she mailed a true and correct copy of the foregoing Docketing Statement to the Plaintiff-Appellees herein, by placing said copy thereof in the United States mail, postage prepaid thereon, addressed to Appellees attorney of record as follows:

Lynn G. Foster
Attorney at Law
602 East Third South
Salt Lake City, Utah 84102

this 1st day of October, 1985.

Gayla R. Cooper

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Gordon R. Mc Dowell, Jr. #2180
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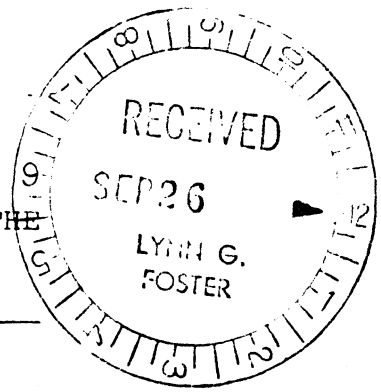

IN THE SUPREME COURT OF THE

STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION, Plaintiff-Respondent, vs. DICK BRADY SYSTEMS, INC. RICHARD BRADY and DOES 1 through 10, Defendants-Appellants.	MEMORANDUM IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR STAY PENDING FEDERAL APPEAL Docket No. 20835

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Plaintiff-Respondent Docutel-Olivetti Corporation ("Respondent") submits the following Memorandum in Opposition to Appellants' Motion for Stay During Federal Appeal.

OBJECTION TO APPELLANTS' STATEMENT OF FACTS

Respondent objects to Appellants' Statement of Facts contained in their Memorandum in Support of Defendants' Motion for Stay During Federal Appeal by paragraph number as follows:

1. The Complaint below was filed on January 24, 1985 and served on Appellants on January 26, 1985. The Complaint below is for goods sold and delivered to Appelants.

2. On February 12, 1985 Appellants filed a Motion for Dismissal or Stay of Proceedings Pending Arbitration with the Court below. That motion was based on the Federal Arbitration Act 9 U.S.C. et. seq. and on the Utah Arbitration Act 78-31-1 et seq. U.C.A. Contrary to Appellants' Statement of Facts, they did not

file a Petition to Compel Arbitration in the Federal District Court until March 8, 1985 more than three weeks after filing the Motion to Dismiss in the State Court below.

3. A hearing was held before Federal Judge Jenkins on May 2, 1985 on Appellants' Federal Court petition. At that hearing Judge Jenkins, having been advised that Appellants' Motion to Dismiss was pending in the State Court, told the Appellants to call up for hearing their motion. Judge Jenkins did not differentiate between Federal or State issues and did not specifically reserve the issue of the Federal Arbitration Act for Federal Court determination.

4. Judge Wilkinson's ruling appealled herein did not by its terms limit itself to the Utah Arbitration Act. Both Federal and State issues were before the Court and the Court must be deemed to have considered both issues in reaching its decision.

5. The Federal District Court case was reassigned to Judge Greene after Judge Wilkinson ruled on Appellants' Motion to Dismiss appealled herein. Judge Greene, over Respondent's objections that Judge Jenkins had referred the matter to the State Court and that Appellants had brought their Federal Arbitration Act claim to State Court, reconsidered Appellants' Federal Court petition and on June 27, 1985 announced the order of the Court from the bench in the presence of counsel for Appellants and Respondent herein which such order was memorialized in writing on August 8, 1985, a copy of which is attached to Appellants' Memorandum in Support of their stay filed herein.

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I.

APPELLANTS' DILEMMA ON THIS APPEAL, IF ANY, IS OCCASIONED BY THEIR OWN FORUM SHOPPING AND SHOULD NOT BE ALLOWED AS GROUNDS FOR STAYING THIS APPEAL

Judge Greene enjoined the parties from litigating in the State Court all issues other than those issues which the "State Court rules are claims under separate credit agreements for collection of unpaid accounts or otherwise pursuant to paragraph 10 of the Dealership Agreement" (Order, August 8, 1985, paragraph 2, page 2, lines 7-9).

Appellants were present in Federal Court on June 27, 1985 when the Court announced the order which was memorialized in writing on August 8, 1985, and were aware of the extent of that ruling when they filed the within Notice of Appeal under Rule 3 U.R.A.P.

Judge Wilkinson below, refused to dismiss Respondent's Complaint and refused to stay the proceedings below because paragraph 10 of the Dealership Agreement provided for litigation of credit collection claims and therefore was not subject to the general arbitration clause of paragraph 12 of the Dealership Agreement between the parties (Order appealled herein, dated June 10, 1985 at p. 1, lines 20-28 and p. 2, lines 1-2).

Appellants, having obtained a disfavorable ruling from Judge Wilkinson, next turned to Judge Greene to consider the same agreement, language and facts which were before Judge Wilkinson in the State Court. Unfortunately Judge Greene, unlike Judge Jenkins, failed to recognize Appellants' forum shopping for what it was and

proceeded to rule on the merits. Essentially Judge Greene vindicated Respondent's position vis a vis credit collection matters and held that those issues were not arbitrable. Judge Greene did rule that to the extent the State Court action alleged breaches of the Dealership Agreement which were not breaches of credit collection claims, those issues should be arbitrated. He therefore enjoined prosecution of Respondent's first two causes of action which he deemed to be allegations of a breach of the Dealership Agreement rather than collection matters. Judge Greene went on to order that arbitration proceedings take place in Utah on other matters between the parties. Judge Greene's authority to order arbitration in Utah in contradiction of the forum selection clause of the Dealership Agreement between the parties, is the subject matter of Respondent's presently pending appeal before the Tenth Circuit Court of Appeals.

Appellants having now failed to stop the credit collection claims before both Judge Wilkinson and Judge Greene, next turned to this Court and filed a Notice of Appeal herein under Rule 3 U.R.A.P. even though the order appealled was clearly interlocutory. As a consequence of this Court's refusal to dismiss the appeal under Rule 3 as being interlocutory, Appellants obtained from this Court, without cost or detriment to them and without a ruling on the merits by this Court, the very stay of the proceedings below denied them by Judge Wilkinson and Judge Greene.

Having obtained the de facto stay of the proceedings below and being advised that this Court had advanced the appeal herein

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on its calendar (Order of this Court dated September 3, 1985) Appellants' now ask this Court to make the stay permanent by deferring any further proceedings herein pending the outcome of the appeal to the Tenth Circuit Court of Appeals.

If Appellants are placed "in a dilemma of compelling them to violate Judge Greene's injunction by proceeding to the merits befc this Court" (Memorandum in Support of Defendants' Motion for Stay During Federal Appeal) it is a dilemma created not by this Court but by Appellants own blatant forum shopping in these proceedings, and by Appellants' filing of the appeal herein knowing of Judge Greene's ruling from the bench on June 27, 1985, memorialized August 8, 1985.

II.

THIS COURT SHOULD IN FACT DISMISS THIS APPEAL RATHER THAN STAY THE PROCEEDINGS HEREIN

Appellants' motion herein to stay this appeal process and the memorandum in support thereof clearly demonstrate the evil associated with forum shopping. Appellants were denied relief first by Judge Jenkins, then by Judge Wilkinson and finally by Judge Greene yet nonetheless continue to seek de facto from this Court what the have been denied by a series of judges, Federal and State, a stay of Respondent's credit collection claim. As argued by Respondent previously before this Court, the appeal herein is interlocutory and an appeal thereon should not have been granted. Rather than stay the proceedings herein, this appeal should be dismissed and the matter referred back to the Trial Court for a determination on

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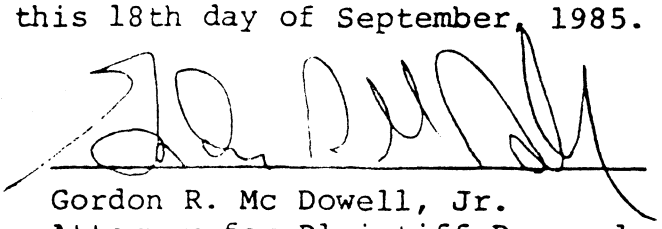
the merits of Respondent's credit collection claim.

Respectfully submitted this 18th day of September, 1985.



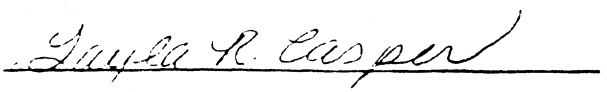
Gordon R. Mc Dowell, Jr.
Attorney for Plaintiff-Respondent

MAILING CERTIFICATE

The undersigned hereby certifies that she mailed a true and correct copy of the foregoing Memorandum in Opposition, etc. to the Appellants herein, by placing said copy thereof in the United States mail, postage prepaid thereon, addressed as follows:

Lynn G. Foster
Attorney at Law
602 East Third South
Salt Lake City, Utah 84102

this 19th day of September, 1985.



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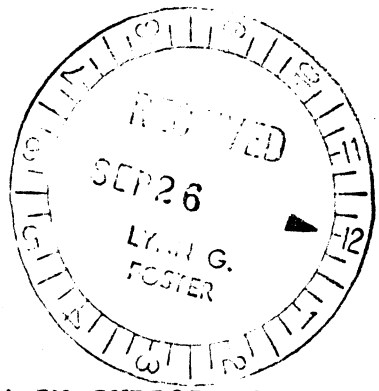

IN THE SUPREME COURT OF THE

STATE OF UTAH

DOCUTEL-OLIVETTI CORPORATION, Plaintiff-Respondent, vs. DICK BRADY SYSTEMS, INC. RICHARD BRADY and DOES 1 through 10, Defendants-Appellants.	MEMORANDUM IN SUPPORT OF PLAINTIFF-RESPONDENT'S MOTIONS TO EXPEDITE APPEAL, COMPEL DISCOVERY, APPOINT A RECEIVER OR REQUIRE A BOND PENDING APPEAL, AND TO DEFINE SCOPE OF TRIAL COURT'S JURISDICTION Docket No. 20835

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Plaintiff-Respondent Docutel-Olivetti Corporation ("Responden submits the within memorandum in support of its various motions.

STATEMENT OF FACTS AND PROCEEDINGS TO DATE

On January 24, 1985 Respondent filed its Complaint below. A copy of that Complaint is attached hereto as Exhibit "A".

The Appellants were served with process on January 26, 1985 and on February 12, 1985 the Appellants filed a Motion for Dismissal or Stay of Proceedings Pending Arbitration, a copy of that motion and the supporting memorandum is attached hereto as Exhibit "B". Appellants' motion was heard on May 24, 1985 and on June 10, 1985 Judge Homer F. Wilkinson entered his order denying Appellants motion to dismiss the proceedings and further denied the motion to stay the proceedings pending arbitration.

On or about June 14, 1985 Appellants filed their Answer and Counterclaim herein, a copy of that Answer is attached hereto as

Exhibit "C".

On June 28, 1985 Respondent served a Notice of Deposition on Richard Brady scheduling his deposition for July 8, 1985. (See Exhibit "A" to the Affidavit of Gordon R. Mc Dowell, Jr. In Support of Motions ("Mc Dowell Affidavit")). On July 2, 1985 at Appellants' request Mr. Brady's deposition was rescheduled to August 5, 1985 (See Exhibit "B" to the Mc Dowell Affidavit). On July 2, 1985 Respondent filed and served a Notice to Produce Documents and a Notice of Deposition under Rule 30(b)(6) U.R.C.P. (See Exhibits "C" and "D" to the Mc Dowell Affidavit). On July 19, 1985 Respondent served Interrogatories, Request for Admissions and Request for Production of Documents on Appellants (See Exhibit "E" of the Mc Dowell Affidavit).

On July 8, 1985 Appellants filed their Notice of Appeal of the June 10, 1985 order and that appeal was assigned Docket No. 20783. The Notice of Appeal was filed in 20783 prior to entry by the court of its order dated July 19, 1985 on Appellants' motion to reconsider the June 10, 1985 order. On July 10, 1985 Respondent filed a Motion to Dismiss Appeal with the Supreme Court in Case No. 20783 and on August 6, 1985 the Supreme Court entered its order granting Respondent's Motion to Dismiss Appeal and dismissed Appellants' appeal in Case No. 20783.

On August 5, 1985 Appellants failed to appear at their deposition and further failed to deliver the documents requested in the notice to produce documents and further refused to grant any discovery below on the grounds of the pending appeal in Docket No.

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20783 (See Exhibit "F" to the Mc Dowell Affidavit).

On August 8, 1985 Respondent filed a motion to the Court below for an order compelling discovery and for sanctions. On or about the same date Appellants filed a new Notice of Appeal which was assigned the docket number herein, 20835.

On August 15, 1985 Appellants filed a Motion to Vacate Dismissal and Reinstate Appeal in Docket No. 20783. On August 22, 1985 Respondent filed a Motion to Dismiss Appeal No. 20835.

On August 23, 1985 Respondent's Motion to Compel Discovery wa heard by Judge Wilkinson who denied the motion because he had been divested of jurisdiction by the various appeals filed by Appellant herein. That ruling was memorialized on September 6, 1985 (See Exhibit "G" to the Mc Dowell Affidavit).

On September 3, 1985 Appellants' Motions to Reinstate Appeal No. 20783 and Respondent's Motion to Dismiss Appeal No. 20835 were heard by this Court. On September 3, 1985 this Court denied the Motion to Reinstate Appeal Number 20783 and denied the Motion to Dismiss Appeal Number 20835.

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POINTS, AUTHORITIES AND ARGUMENT

I.

The Appeal Herein Although Granted Under Rule 3 U.R.A.P. By This Court Is Interlocutory

The proceedings below have not been completed. Indeed Appell ants have refused to grant discovery below. All that has taken pl below is a Complaint, denial of a Motion to Dismiss or Stay

Proceedings and an Answer and Counterclaim. By any definition, this appeal is interlocutory. Kennedy v New Era Industries, Inc. 600 P.2d 534 (Utah 1979); Salt Lake City Corporation v Layton 600 P.2d 538 (Utah 1979); Pate v. Marathon Steel Company 692 P.2d 765 (Utah 1984).

II.

The Appeal Herein Being Interlocutory Has Not Divested The Trial Court Of Jurisdiction Below And The Trial Court Should Be Allowed To Continue The Proceedings Below Including Discovery Proceedings Pending The Appeal.

Generally an appeal is taken from a final judgment into which is merged all of the former proceedings. Since the appealable judgment contains all of the proceedings an appeal naturally brings the Trial Court's participation to an end until such time as the Appellate Court remits the proceedings. In this case, however, no final judgment on the merits has been rendered and much of the proceedings including discovery need to be completed. Appellants take the position that an appeal of any issue totally deprives the District Court of jurisdiction.

An analogous situation has been presented in domestic relations cases in Utah. In those cases, although there may have been a final determination as to some issues, e.g. property matters, support, etc., an appeal of that judgment does not divest the District Court of jurisdiction with respect to unresolved matters. (See generally Peters v Peters 394 P.2d 71 (UT. 1971); Warren v Warren 642 P.2d 385 (UT. 1982).

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In Grand Central Mining Co. v Mammoth Mining Co. 36 Utah 364, 104 P. 573 (UT) appellants argued that an appeal of a counterclaim stayed proceedings on the original Complaint and objected to certain orders entered therein by the District Court. This Court held that only the counterclaim issues were before it and only those issues were stayed below and the Trial Court retained jurisdiction to proceed on the Complaint itself. The Court held:

> "The case reviewed by us embracing only the issues and the proceedings involved in the counterclaim, and which were necessarily adjudged by us to be independent of, and separate from, the then untried and undetermined issues raised by the complaint, we do not see wherein the district court was without jurisdiction to proceed as was done, especially since its action, was not arrested nor stayed by a supersedeas bond or otherwise."
>
> Grand Central Mining Co. v Mammoth Mining Co. Id. at 577

The District Court's jurisdiction is provided in Article VIII Section 5 of the Constitution of Utah and in §78-3-4 U.C.A. §78-3-4 grants the District Court jurisdiction in all matters civi and criminal not excepted in the Constitution and not prohibited b law. Under the Constitution and the statute the trial court canno be divested of its jurisdiction by the filing of an appeal.

Since the District Court cannot be divested of its jurisdiction what Appellants actually claim is that the appeal of the June 10, 1985 order acts as a stay of all other proceedings below, including discovery, a "supersedeas". Supersedeas in defined in Blacks Law Dictionary 5th ed. as follows:

> "The name of a writ containing a command to stay the proceeding at law."

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The text writers explain the relationship between an appeal and supersedeas as follows:

> "Originally supersedeas was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute or which might come into his hands. It is now often used synonymously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment."
>
> 4 AM JUR 2d. Appeal and Error, §634

In these proceedings there has been no judgment or order upon which an automatic stay on appeal would issue. What Appellants urge is that the entire proceedings be stayed not just the order appealed from. The text writers answer this assertion as follows:

> "...the general rule under modern statutes in most jurisdictions in this country is that the writ of error or appeal does not of itself operate as a supersedeas."
>
> 4 AM JUR 2d. Appeal and Error, §365

There is no provision in Utah statutory law permitting supersedeas in these proceedings. The text writers state:

> "In the absence of express statutory authorization, it is apparent that the appellant is not entitled to supersedeas or stay of proceedings as a matter of right."
>
> 4 AM JUR 2d. Appeal and Error, §366

The only provisions for supersedeas (stay of proceedings) in Utah law are found in Rule 62(d) U.R.C.P. where a stay may be obtained from execution of a judgment; in Rule 5(d) U.R.A.P. where discretionary review from interlocutory orders is provided; and under Rule 8 U.R.A.P. where an application for a stay of the

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judgment or order of a District Court is provided. In each of these cases an application must be made and each provides for posting of a bond. Nowhere is there any authority that filing an appea on an order of the type appealled from herein, automatically stays the trial court proceedings. It cannot be the rule that by filing an appeal on any issue all proceedings grind to a halt without any protection to other parties in litigation.

This Court should order as it could have ordered upon consideration of a Rule 5 U.R.A.P. request for an interlocutory appeal, that only the issue of arbitration will be considered and that the trial court retains jurisdiction of all other proceedings including discovery. If this Court determines that the trial court has been divested of jurisdiction by this appeal or that the entire proceedings below should be stayed pending the appeal then it should protect Respondent during the pendency of this appeal, by requiring Appellants to post a bond in the amount of $59,252.60 being the amount prayed for in the Complaint and that such bond should remain in place through conclusion of the trial court proceedings on remand.

Respondent prevailed below and until this Court rules otherwise, the June 10, 1985 order appealled from herein must be presumed to be correct. Appellants without any protection whatsoever to Respondent, should not be able to obtain the relief denied below (Stay of Proceedings) by the simple expediency of filing a Notice of Appeal herein. Were such a result to prevail, the proceedings before the trial court would be a useless act and the part

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may just as well litigate their claims before this Court, which is exactly what is happening herein.

III.

Respondent Is A Secured Creditor Of Appellant Dick Brady Systems, Inc. And Is Entitled To The Remedies Of A Secured Creditor Herein

The Dealership Agreement between Respondent and Appellant Dick Brady Systems, Inc. (See copy of Agreement attached to Exhibit "A" hereof) paragraph 10 provides inter alia:

> "Dealer hereby grants Olivetti a security interest in all Olivetti brand equipment and inventory which Dealer presently owns or may hereafter acquire and any additions or accessions thereto and the proceeds thereof"
>
> ...
>
> If an event of default by Dealer occurs under any credit agreement with Olivetti, Olivetti may, among other remedies, avail itself of any remedy in effect now or at the time of default under the Uniform Commercial Code or any similar statute."

Respondent has perfected a security interest against Appellant Dick Brady Systems. Attached hereto as Exhibit "D" is a certified copy of the Financing Statement on file in Utah.

The Affidavit of Gilbert R. Peterson filed below (see Exhibit "E" hereto) attaches thereto a copy of an invoice typical of all invoices shipped to Appellants in connection with the purchase of products from Respondent. That invoice provides:

"A/R Terms: Due in 60 days."

Mr. Peterson in paragraph 4, page 2 of his affidavit states:

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"When products are purchased by a dealer those products are shipped and an invoice is generated and mailed. In most cases the invoice is mailed within a few days after products are shipped."

Mr. Peterson goes on to state in paragraph 6, page 3 of his affidavit that:

"There is nothing in my records reflecting that Dick Brady Systems, Inc. did not receive invoice 01-253052 nor any of the other 32 outstanding invoices. There is no record in my files, nor am I aware of any record, reflecting that Dick Brady Systems, Inc. ever objected to any of the 33 outstanding invoices including the terms of payment thereunder."

Section 70A-2-607 Utah Code Annotated (1953 as supplemented) provides in part:

"(1) The buyer must pay at the contract rate for any goods accepted."

...

"(3) Where a tender has been accepted

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy..."

Section 70A-2-606 Utah Code Annotated provides in part:

"70A-2-606. What constitutes acceptance of goods.

(1) Acceptance of goods occurs when the buyer

...

(b) fails to make an effective rejection (subsection (1) of section 70A-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them..."

Section 70A-2-602(1) provides:

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> "Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonally notifies the seller."

Section 70A-2-201(2) Utah Code Annotated provides:

> "(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know of its contents, it satisfies the requirement of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received..."

The net effect of the above quoted sections is that where goods have been delivered and accepted by a buyer that buyer must pay for those goods at the contract rate. Goods are accepted when the buyer fails to reject the goods and so notify the seller within a reasonable period of time thereafter of the rejection. The terms of the contract are established where a confirmation of the terms is sent to the buyer and the buyer fails to object to the terms within ten days.

Mr. Peterson in his affidavit states that invoices are mailed a few days after shipment of goods and that those invoices contain the payment terms for the goods shipped. Mr. Peterson further states in paragraph 6, page 3 of his affidavit that there are presently 33 outstanding invoices totaling $49,147.70, the latest of which is dated November 27, 1984. Mr. Peterson further testifies that there are no records reflecting that Dick Brady Systems failed to receive the invoices or objected thereto.

More than a year has elapsed since shipment of

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many of the goods and invoices forming the nexus of Respondent's claim against Appellants, were shipped and mailed. Appellants have failed to reject delivery of those goods or object to the payment terms therefor. Under the foregoing statutes Appellants must pay for those goods.

§70A-9-503 Utah Code Annotated entitles a secured creditor such as Respondent, to take possession of collateral upon default. Appellants have defaulted in payment for the goods sold to them and Respondent is entitled to possession of the collateral set forth in the Financing Statement on file in Utah and under the Security Agreement contained in the Dealership Agreement.

§70A-9-503 provides for either a writ of replevin or other legal process to enable a creditor to obtain possession of the collateral. Respondent asks this Court to appoint a receiver to account for, identify and take possession of the collateral as provided in §70A-9-503 U.C.A.

IV.

Respondent Should Be Permitted To Conduct Discovery During This Interlocutory Appeal

As set forth above, the proceedings below have barely begun and Appellants have refused to grant discovery to Respondent.

Respondent is a secured creditor entitled to know what has happened to its collateral and the legal reasons why Appellants refuse to pay for goods sold to them. Respondent is entitled to delivery of collateral securing Appellants' indebtedness to it. Appellants have refused to give Respondent any information concern

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the kind, extent, value, identity or location of its collateral. Further Appellants deny that there is any credit agreement between the parties at all.

It is obvious that these Appellants intend to drag this appeal out as long as possible (See Appellants' Motion to Stay Proceedings Pending Federal Appeal filed herein dated September 16, 1985 and Appellants' Motion to Vacate and Strike Dates for Filing Briefs and for Extension of Time filed herein and dated September 17, 1985) in a concerted effort to obtain by procedural maneuvering that which was denied them below (Stay of Proceedings). Respondent should be entitled to at least conduct discovery during this appeal. Discovery will be necessary below if the Appellants are unsuccessful on appeal and will greatly expedite the trial below on remand. Respondent is certainly entitled to know the reasons why the Appellants claim they don't owe for goods sold and delivered to them and the status and location of the collateral securing Appellants' indebtedness to Respondent.

Even if the Appellants were to prevail on appeal herein, the discovery conducted would be necessary in arbitration proceedings and would expedite those proceedings.

Respondent, having prevailed below, should not be deprived of discovery by this appeal.

CONCLUSION

Appellants are fond of characterizing Judge Wilkinson's order appealled herein as an "anti-arbitration" order. In fact the order is no such thing. The order by its terms states that the

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credit collection claims are not arbitrable. It is neither pro nor anti arbitration. It says simply that arbitration does not apply. Appellants attempt to confuse the issues herein by invokir a sacred arbitration right and characterizing any position contrar to their own as "anti-arbitration".

A Federal and State judge have now looked at their arguments and both agreed that the credit collection claims are not subject to arbitration. Unfortunately this Court, by granting an appeal under Rule 3 U.R.A.P., has caused the District Court to conclude that it has no further jurisdiction below thereby giving to Appellants the relief denied them by a succession of Federal and State judges without any protection or consideration of the rights of Respondent herein. Respondent by these motions suggests some relief herein which this Court might grant to it. The Court might consider other relief which would accomplish the goal of giving Appellants an opportunity to convince this Court that the credit collection claims are arbitrable without totally depriving Respondent of an effective remedy below.

Respectfully submitted this 18 day of September, 1985.

Gordon R. Mc Dowell, Jr.
Attorney for Plaintiff-Respondent

MAILING CERTIFICATE

The undersigned hereby certifies that she mailed a true and correct copy of the foregoing Memorandum, etc. to the Appellants

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herein, by placing said copy thereof in the United States mail, postage prepaid thereon, addressed as follows:

Lynn G. Foster
Attorney at Law
602 East Third South
Salt Lake City, Utah 84102

this 19th day of September, 1985.

Gayla L. Casper

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

In the Matter of the Arbitration betwen DICK BRADY SYSTEMS, INC., a Utah corporation, and RICHARD BRADY,

ORDER

Petitioners,

vs.

Civil No. C85-280G

DOCUTEL-OLIVETTI CORPORATION,

Respondent.

The above entitled matter came before the Court on the 27th day of June 1985, at the hour of 3:00 p.m.; Lynn G. Foster and John R. Merkling appeared for Petitioners and Gordon R. McDowell appeared for Respondent; the Court considered the memoranda and documents filed by the parties and heard extensive argument of counsel, after which the matter was submitted to the Court for decision and taken under advisement. The Court now being fully advised, and having entered Findings of Fact and Conclusions of Law, enters the following Order:

1. Docutel-Olivetti Corporation, Dick Brady Systems, Inc. and Richard Brady, their agents, employees, successors, assigns and attorneys are hereby restrained and enjoined from proceeding in litigation in either Federal or State Courts as to any and all disputes between the parties arising under the Dealership Agreement or pertaining in any manner to the

dealership created thereby, including to the extent applicable claims which Docutel asserts against Systems and Brady under the First and Second Causes of Action set forth in Docutel's Complaint, pending in the Third Judicial District Court in and for Salt Lake County, State of Utah, Civil No. C85-506, except to the extent that the relief sought thereunder shall be ruled by the said state court to be based upon claims under separate credit agreements for collection of unpaid accounts or otherwise pursuant to paragraph 10 of the Dealership Agreement. The parties are enjoined from proceeding further in litigation in the aforesaid State Court Complaint as to the Third cause of action set forth therein. Docutel may proceed in State Court as to the Fourth Cause of Action set forth in the aforesaid State Court Complaint as authorized by paragraph 10 of the Dealership Agreement. Nothing herein shall be construed to prohibit any party from pursuing litigation remedies for enforcement of rights arising under the Dealership Agreement, or rights under the personal guaranty of Richard Brady, in connection with any award which may be reduced to judgment pursuant to arbitration proceedings.

2. The parties, including Richard Brady, are ordered to proceed to arbitration as to all disputes and claims arising under the Dealership Agreement or pertaining in any manner to the dealership created by the Dealership Agreement, including to the extent applicable the First and Second Causes of Action, and the claims set forth in the Third Cause of Action, in the pending case in state court, Civil No. 85-506.

3. Except as provided herein, it is ordered that hearings and proceedings between the parties in arbitration as to disputes and claims arising under or pertaining in any manner to the dealership created by the Dealership Agreement as set forth at paragraph 12 therein, shall be held and take place within the District of Utah. Effective August 20, 1985, unless this Court grants Respondent's pending Motion to Stay, it is ordered that all issues between the parties currently in arbitration elsewhere shall be transferred to the District of Utah and consolidated with the issues and matters which this Court has placed in arbitration in the District of Utah pursuant to this Order.

4. No costs or attorney's fees are awarded herewith to any party.

DATED: August 8th, 1985.

J. THOMAS GREENE
UNITED STATES DISTRICT COURT

cc: